IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. TRACI STUBBLEFIELD,	)	
Appellant-Relator	)	
vs.	)	Cause No. SC83858
HON. CAROL KENNEDY BADER, Juvenile Judge of the Twenty-Third Judicial Circuit of Missouri,	)	
Respondent	)	

RELATOR'S BRIEF
IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

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INDEX

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

Relator, Traci Stubblefield, seeks a Writ of Prohibition against Respondent, the Honorable Carol Kennedy Bader, Associate Circuit Judge for Jefferson County, Missouri, prohibiting Respondent from proceeding in Juvenile cases JU301-106-J, JU301-107-J, and JU301-108-J. Jurisdiction is proper in the Supreme Court of Missouri under Missouri Supreme Court Rule 97 and because Relator previously filed said Petition for Writ of Prohibition in the Eastern District Court of Appeals, State of Missouri, and said petition was denied without opinion.

STATEMENT OF FACTS

The underlying proceedings concern petitions filed for neglect and abuse with regard to Relator's three children. (Ex. D, pp. 1-9; Ex. E, pp. 1-9.) Respondent issued Temporary Protective Custody Order on February 15, 2001 and set the Temporary Protective Custody Hearing for February 22, 2001. (Ex. C, pp. 1-6; Ex. H.) Petitions were filed with the Circuit Clerk of the Juvenile Division of the Twenty-Third Judicial Circuit, Jefferson County, Missouri, on February 16, 2001, which set the first hearing for April 30, 2001. (Ex. D, pp. 1, 4 and 7) Relator was mailed Notice of Protective Custody Hearing on February 16, 2001. (Ex. H.) The temporary Protective Custody Hearing was held on February 22, 2001, at which legal and physical custody were awarded to the Division of Family Services. (Ex. O, pp. 1, 5 and 9) On February 22, 2001 Relator was served with summons. (Ex. O, p. 1). On February 23, 2001, Relator was appointed counsel, who entered her appearance on March 2, 2001. (Ex. K; Ex. L.) On March 12, 2001, Respondent ordered that the three children be placed in physical custody of the maternal aunt, Lisa Rohlfing, and her spouse, Don Rohlfing. (Ex. M, pp. 1-4) The First Amended Petitions were filed with the Circuit Clerk of the Juvenile Division of the Twenty-Third Judicial Circuit, Jefferson County, Missouri, on April 25, 2001. (Ex. E, pp. 1-9) At the first hearing on April 30, 2001, Relator denied the allegations of said petitions and filed a Request for Trial Setting. (Ex. B; Ex. O, pp. 3, 7 and 11) Respondent granted Relator's Request for Trial Setting, writing: "Cause set for trial on August 20, 2001 at 9:00 a.m." (Ex. B) No judgment was entered into the court record on the matter regarding the Relator. (Ex. O, pp. 3-4, 7-8 and 11-12; Ex. P, pp. 1-3) A Default Judgment and Finding of Jurisdiction against the natural father in two of the three said causes was ordered on April 30, 2001. (Ex. P, pp. 1-3) Following the first hearing on April 30, 2001, Relator timely filed a Request for Change of Judge later that same day and within the five days after the trial date was set pursuant to MO.S.CT.R. 126.01. (Ex. A.) Respondent denied Request for Change of Judge, writing

on the Request: “Request denied. Court has already taken jurisdiction over the juveniles by virtue of judgment entered April 30, 2001. So ordered. Carol Bader 4/30/01”. (Ex. A.)

POINT RELIED ON

I. RESPONDENT ERRED IN DENYING RELATOR'S REQUEST FOR CHANGE OF JUDGE BECAUSE RESPONDENT EXCEEDED HER JURISDICTION IN THAT RELATOR'S REQUEST WAS FILED WITHIN FIVE (5) DAYS OF THE SETTING FOR TRIAL IN ACCORDANCE WITH MISSOURI SUPREME COURT RULE 126.01.

Missouri Supreme Court Rule 126.01 (2001)

ARGUMENT

I. RESPONDENT ERRED IN DENYING RELATOR'S REQUEST FOR CHANGE OF JUDGE BECAUSE RESPONDENT EXCEEDED HER JURISDICTION IN THAT RELATOR'S REQUEST WAS FILED WITHIN FIVE (5) DAYS OF THE SETTING FOR TRIAL IN ACCORDANCE WITH MISSOURI SUPREME COURT RULE 126.01.

Respondent's denial of Relator's Request for Change of Judge in Cases JU 301-108-J, JU 301-107-J, and JU 301-106-J exceeded Respondent's jurisdiction in that Relator's Request for Change of Judge was filed within five (5) days of the setting for trial as required by Missouri Supreme Court Rule 126.01. Prohibition is the proper remedy afforded Relator. MO.S.CT.R. 97.03 states:

> "Application for a writ of prohibition shall be made by filing a petition in prohibition in the appropriate court. The petition in prohibition shall contain a statement of the facts, the relief sought, and a statement of the reasons why the writ should issue. A copy of any order, opinion, record or part thereof, or other thing which may be essential to an understanding of the matters set forth in the petition in prohibition shall be attached as exhibits if not set forth therein. The petition in prohibition shall be accompanied by suggestions in support thereof."

"The remedy afforded by the writ of prohibition shall be granted to prevent usurpation of judicial power, and in all cases where the same is now applicable according to the principles of law." MO. REV. STAT. § 530.010 (2001).

The well-established rule allows prohibition to be used to challenge a trial court's jurisdiction. State ex rel. Mitchell v. Dalton, 831 S.W.2d 942, 943 (Mo.Ct.App. E.D. 1992). Prohibition is generally allowed to avoid useless suits and thereby minimize inconvenience, and to grant relief when proper under the circumstances at the earliest possible moment in the course of litigation. State ex rel. Hamilton v. Dalton, 652 S.W.2d 237, 239 (Mo.App. E.D. 1983). Prohibition lies to prevent a court from acting in excess of its jurisdiction. State ex rel. E. Carter Co. R-II School Dist. v. Heller, 977 S.W.2d 958, 959 (Mo.App. S.D. 1998); State ex rel. McCulloch v. Schiff, 852 S.W.2d 392, 393 (Mo.App. E.D. 1993); State ex rel. Ellis v. Schroeder, 663 S.W.2d 766, 768 (Mo.App. E.D. 1983). Prohibition is a means of restraint on judicial personnel to prevent usurpation of judicial power, and its essential function is to confine subordinate courts to their proper jurisdiction and to prevent them from acting without or in excess of their jurisdiction. Id.; see also State ex rel. Hamilton v. Dalton, 652 S.W.2d 237, 239 (Mo.App. E.D. 1983).

Writ of prohibition is an appropriate remedy when a lower court lacks jurisdiction to proceed. State ex rel. Weisman v. Edwards, 645 S.W.2d 732, 733 (Mo.App. E.D. 1983). Since the writ is preventative in nature rather than corrective, a writ will issue to restrain commission of a future act. Id.; see also McCulloch, 852 S.W.2d at 393. Prohibition is appropriate to compel a trial judge to comply with the rules of the Supreme Court of Missouri where there is no adequate remedy by appeal. State ex rel. Bullington v. Mason 593 S.W.2d 224, 225 (Mo. banc. 1980); State ex rel. American Family Mut. Ins. Co. v. Koehr, 832 S.W.2d 7, 8 (Mo.App. E.D. 1992).

The right to disqualify a judge is a keystone of our judicial system, and Missouri courts follow a liberal rule construing it. State ex rel. Horton v. House, 646 S.W.2d 91, 93 (Mo. banc. 1983). Upon the filing of a proper timely application for a change of judge under the rule, the court has no jurisdiction to do anything other than to grant the application. State ex rel. Cohen v. Riley, 994 S.W.2d 546, 547 (Mo. banc. 1999); State ex rel. Anderson v. Frawley, 923 S.W.2d 960, 961 (Mo.App. E.D. 1996); State ex rel. Stephens v. Lamb, 883 S.W.2d 101, 102 (Mo.App. S.D. 1994); State ex rel. Mountjoy v. Bonacker, 831 S.W.2d 241, 243 (Mo.App. S.D. 1992); Walsh v. Director of Revenue, 772 S.W.2d 865, 866 (Mo.App. E.D. 1989).

Respondent erred in denying the request for change of judge in that Relator's Request for Change of Judge strictly complied with Mo.S.Ct.R. 126.01 which states:

> "a. A change of judicial officer of the court shall be ordered:
>
> (1) when the judicial officer of the court is interested, related to a party, or otherwise disqualified under Rule 51.07; or
>
> (2) upon application of a party. The application need not allege or prove any cause for such change of judicial officer and need not be verified.
>
> b. The application must be filed within five days after a trial date has been set, unless the trial judicial officer has not been designated within that time, in which event the application must be filed within five days after the trial judicial officer has been designated. If the designation of the trial judicial officer occurs less than five days before trial, the application must be filed prior to commencement of any proceedings on the record.

c. For purposes of this Rule 126.01, a supplemental petition and a motion to modify a prior order of disposition under Chapter 211, RSMo., shall not be deemed to be an independent civil action unless the judicial officer designated to hear the motion is not the same judicial officer that heard the previous action.

d. If one application has been made by a party other than the juvenile officer, no further application shall be permitted except an application of a party whose interests conflict with the interest of the party making the prior application."

Notwithstanding its unique jurisdiction, a juvenile court remains first and foremost a court of justice. In Interest of M.K.R., 515 S.W.2d 467, 470 (Mo. 1974). A juvenile court is a tribunal of limited jurisdiction, whose powers are confined strictly to the authority given by statute. In the Interest of K.W.H., 477 S.W.2d 433, 438 (Mo.App. St.L.D. 1972). Although the Juvenile Code is to be liberally construed so as to provide such care as is necessary to a child's welfare, such construction may not be utilized to give the juvenile court jurisdiction and powers not conferred upon it by statute. In Interest of M.K.R., 515 S.W.2d at 470; see also B.L.W. by Ellen K. v. Wollweber, 823 S.W.2d 119, 121-122 (Mo.App. S.D. 1992). The exercise of the right to disqualify a judge requires strict compliance with the provisions of the rule. Nixon v. Director of Revenue, 883 S.W.2d 945, 947 (Mo.App. E.D. 1994); Whalen, Murphy, Reid, Danis, Garvin & Tobben v. Estate of Roberts, 711 S.W.2d 587, 591 (Mo.App. E.D. 1986).

The time in which to file a timely request for change of judge pursuant to MO.S.CT.R. 126.01 is commenced by the occurrence of two events: (1) appointment of the judge, *only* if one is not appointed, or (2) setting of the trial date.

In the Twenty-Third Judicial Circuit, Jefferson County, Missouri, Respondent is the appointed Judicial Officer of the Juvenile Court. All juvenile cases in the Twenty-Third Judicial Circuit are assigned originally to Respondent. In this case, Respondent was the appointed judicial officer since the commencement of these proceedings on February 15, 2001. (Ex. O, p. 1). Thus, there is no dispute as to whether or not the judge has been appointed. Under a plain reading of MO.S.CT.R. 126.01, a party has five days from the time the cause is set for trial to file a motion requesting a change of judge for no cause, if the judge has been appointed. Since Respondent was the assigned judge of the cause from the onset of these proceedings, it is the setting of the trial date that commences the time running and serves as the measuring stick by which to gauge whether Relator's Request for Change of Judge was filed in a timely manner. The appointing of a trial judge is the only exception as to what determines if the application is timely filed, *only* if one is not appointed, which is not the situation in this case. (see Mo.S.Ct.R. 126.01). Since Respondent was the appointed judge since the issuance of the Temporary Custody Orders on February 15, 2001, the five-day period in which to request a change of judge without cause begins to run from the date the trial date is set. Prior to April 30, 2001, no trial date was set. On April 30, 2001, Relator denied the allegations of the Petition and filed a Request for Trial Setting. (Ex. B). On the same day, Respondent wrote on the Request for Trial Setting: "Cause set

for trial on August 20, 2001 at 9:00 a.m." (Ex. B) The Request for Change of Judge was filed and denied later on that same day. (Ex. B; Ex. O, p. 3-4). Hence, the motion strictly complied with MO.S.CT.R. 126.01, and Respondent erred in dismissing the application.

Respondent argues that under In the Interest of M.S.M., 666 S.W.2d 800, 804 (Mo.App. W.D. 1984), the "trial" date, for purposes of the rule allowing change of judge, was the date set forth on summons served the parent. (Respondent's Answer, Par. 5). This is a misinterpretation of the case, where the court ruled that "in this case" the summons set the date for trial. In the Interest of M.S.M., 666 S.W.2d 800, 803 (Mo.App. W.D. 1984). The facts set forth established that the date on the summons was the trial date in that on that date a trial occurred in which Mrs. M--- participated and testified. Id., at 802. The change of judge in that case was not granted because the application was not made in the time set forth in the rule for change of judge. Id., at 805.

In the Interest of M.S.M. is inapplicable to the case at hand. Unlike In the Interest of M.S.M., the facts of the case at hand establish that the date on the summons and petition served on Relator was merely an announcement date. No trial occurred on the date set forth on the summons and petition. (Ex. O). In fact, the record reveals the obvious intention that no trial will ever occur on such a "setting" as evidenced by the form "Request for Trial Setting." (Ex. B). Clearly this form is provided when a natural parent denies the allegations set forth in the petition. Upon such a denial, the case is set for trial, with the length of the trial written in the space provided. (see Ex.

B). Only if there is a consent or default will there be a finding of jurisdiction on such court dates. (see Ex. P). Under these facts, it is difficult to frame an argument that the initial court date was intended to be a trial setting.

Further, the facts reveal that the court date of April 30, 2001, was not actually treated as a trial setting. Relator on the date set forth in the summons and petition denied the allegations and the matter was on that date set for trial on a separate date nearly four months later. (Ex. B; Ex. O, pg. 3). This trial setting was set forth by the court without any request for continuance by any party. (Ex. O). The mere denial of allegations would not have the effect of postponing an actual trial setting. The record clearly reveals that no one anticipated a trial on April 30, 2001, but that this was the announcement date on which the August trial date was set. As such, Relator was entitled to request a change of judge up to May 5, 2001.

In Respondent's denial of the Request for Change of Judge, Respondent wrote on the order that the "Court has already taken jurisdiction over the juveniles by virtue of judgment entered on April 30, 2001." (Ex. A.) Nowhere is the word "jurisdiction" mentioned in the rule, nor does it effect a request that strictly complies with the rule.

No judgment as defined by MO.S.CT.R. 119.06 was entered on April 30, 2001. MO.S.CT.R. 119.06(a) states: "The judgment shall include the disposition or treatment of the juvenile." The procedure for entering a judgment in MO.S.CT.R. 119.06(b) states: "When a judgment is entered, the clerk shall serve a copy of the judgment entry and notice of entry of judgment substantially in the form recommended in Rule 128.21

by mail in the manner prescribed in Rule 43.01 or by hand delivery upon every party affected thereby, including those not present."

The only two orders issued by Respondent on April 30, 2001, set the trial date in the said causes for August 20, 2001, and entered a Default Judgment and a Finding of Jurisdiction against the natural father in Cause Nos. JU 301-106-J and JU 301-107-J. (Ex. B; Ex. P; Ex. O, p. 3). No judgment nor any finding of jurisdiction pertaining to the Relator was entered into the record of the court. (Ex. O, p. 3). No order concerning the disposition or the treatment of the juveniles was entered on April 30, 2001. Id. Only after the trial scheduled for August 20, 2001, will a judgment, pursuant to MO.S.CT.R. 119.06, be entered pertaining to Relator and Relator's three children. So Respondent erred in saying "by virtue of judgment entered on April 30, 2001."

Jurisdiction attached when the three juveniles were taken into custody on February 16, 2001, and not by virtue of judgment entered on April 30, 2001. MO.REV.STAT. § 211.131(3) (2000) states: "The jurisdiction of the court attaches from the time the child is taken into custody."

The statute specifies that jurisdiction attaches when the child is taken into custody, which in the case at bar occurred on February 15, 2001, when the Temporary Custody Orders were issued. No finding of jurisdiction over the children was entered on April 30, 2001. A Default Judgment and a Finding of Jurisdiction against the natural father in Cause Nos. JU 301-106-J and JU 301-107-J were entered on April 30, 2001. (Ex. P; Ex. O, p. 3). Even if Respondent was correct in her reasoning that jurisdiction over the children was taken by the entrance of a Finding of Jurisdiction

against the natural father, this only would apply in two of the three causes. Thus, the child concerned in Cause No. JU 301-108-J currently would not be under the jurisdiction of the court, which is erroneous. All three children are under the jurisdiction of the court, not because of a judgment entered on April 30, 2001, but due to their being taken into custody on February 15, 2001. So Respondent errs in saying "Court has already taken jurisdiction over the juveniles by virtue of judgment entered on April 30, 2001."

The issue at bar is whether this particular judge has jurisdiction to hear this particular trial after a timely filed motion for change of judge is filed. As set forth in Cohen, Anderson, and Walsh, Respondent is deprived of further jurisdiction to do anything except for granting the application for change of judge. Cohen, 994 S.W.2d at 547; Anderson, 923 S.W.2d at 961; Walsh, 772 S.W.2d at 866. After the denial of the motion, any other action taken by Respondent is an act in excess of her power, a usurpation of judicial power and prohibition lies to restrain further commission of any act by the Respondent.

Relator strictly complied with MO.S.CT.R. 126.01, and Respondent's denial of Request for Change of Judge is a misapplication of law. In her order denying the Request for Change of Judge, Respondent's cited reason for denial does not equate to a valid cause for denial of the motion. In that same order, Respondent did not state that the motion was not filed in time and in strict compliance with MO.S.CT.R. 126.01. (Ex. A). Since jurisdiction over the children already was established and uncontested,

the cause for denial of the Request for Change of Judge is an erroneous conclusion made in order to maintain Respondent's jurisdiction over said causes.

In State ex rel. B.C.C. v. Conley, 568 S.W.2d 605, 608 (Mo.App. W.D. 1978), the Court wrote:

> "To deny the juveniles the right to a change of judge on the flimsy theory that the continuity achieved by a single judge presiding over their welfare so overwhelmingly inures to their benefit that all other valid considerations should be excluded is a hollow argument which makes a mockery and a farce of the fundamental right to have matters affecting one's liberty and freedom adjudicated by an impartial judge."

Relator has a fundamental right to have this matter concerning her fundamental parental rights adjudicated by an impartial judge. Not only does Relator retain this right, but Respondent currently lacks the jurisdiction to hear this cause and to decide any further matters concerning the liberty, freedom and pursuit of Relator's fundamental parental rights.

Relator does not contest that the Juvenile Court Division of the Twenty-Third Judicial Circuit maintains jurisdiction over the juveniles, but that Respondent retains jurisdiction to commit only one act — to grant the change of judge application. Anything else is a usurpation of judicial power.

CONCLUSION

Respondent erred in stating that the Request for Change of Judge was denied because the "Court had already taken jurisdiction over the juveniles by virtue of judgment entered April 30, 2001." No judgment as defined by MO.S.CT.R. 119.06 was entered, and jurisdiction attached two months prior when the juveniles were taken into custody by the court. The Request for Change of Judge was timely filed, leaving Respondent jurisdiction only to grant the change of judge application. To do otherwise is a usurpation of judicial power.

Respectfully submitted,

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AFFIDAVIT OF SERVICE OF RELATOR'S BRIEF

STATE OF MISSOURI)
) SS.
COUNTY OF JEFFERSON)

BIANCA L. EDEN, being first duly sworn, does state that on the 9th day of October, 2001, two (2) copies on paper and one (1) copy on disk of the foregoing Relator's Brief were mailed by United States, Mail, postage prepaid to:

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Subscribed and sworn to before me this 9th day of October, 2001.

_____
Kathryn L. Murphy – Notary Public

AFFIDAVIT OF COMPLIANCE

STATE OF MISSOURI)
) SS.
COUNTY OF JEFFERSON)

BIANCA L. EDEN, being first duly sworn, does state as follows:

1. That the Relator's Brief In Support of Petition for Writ of Prohibition complies with the limitations set forth in Missouri Supreme Court Rule 84.06(b);

2. That the number of words in the Relator's Brief In Support of Petition for Writ of Prohibition is 3,898;

3. That the disk of the Relator's Brief In Support of Petition for Writ of Prohibition has been scanned for virus and is virus-free.

_____

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Subscribed and sworn to before me this 9th day of October, 2001.

_____

Kathryn L. Murphy – Notary Public